

THE STATE  
versus  
TAFIRENYIKA ROPA

HIGH COURT OF ZIMBABWE  
HUNGWE J  
MUTARE, 17, 20 & 25 June 2014

### **Criminal trial**

*Ms J Matsikidze*, for the State  
*C Ndhlovu*, for the Accused

HUNGWE J: The accused faces a charge of murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] arising from the events of 22 August 2013 at Rupinda Clinic, Mutasa, Mutare where it is alleged that the accused unlawfully and with actual intent to kill or realizing the real risk or possibility that death may occur, struck Hazvineyi Mutizawafa with pieces of firewood all over the body thereby inflicting injuries from which she died. He pleaded not guilty.

Most of the facts in this case were common cause and may be summarised as follows. The accused and deceased were husband and wife respectively. On the day in issue, accused arrived home around 1900 hours. He found his wife speaking to someone on her mobile phone. Upon realising his presence, the wife cut off the person on the other end and proceeded with her routine tasks including serving him his supper. He was suspicious. His suspicions as to who his wife was speaking with. He noticed that she had perched her phone on a high spot within the house so that it receives a signal. The mobile handset's LCD screen flicked indicating that there was an incoming call and that it was on silent mode. She did not pick the call. Eventually, he picked the mobile phone and noticed there was an unidentified missed calls from the same number. He took it down and searched it in his contacts to no avail. When he quizzed her over it, she refused to say who the caller was. Instead she attempted to wrestle the handset out of his possession. In the struggle that followed what took place is not clear. What is certain however is that she sustained injuries from which she died

the same night.

The State alleges that he had struck her several times all over her body with pieces of firewood resulting in injuries from which she died. The accused denies that he had intended to kill her when he assaulted her but that she was the first to strike him with an open hand. He retaliated and this exchange degenerated into a fight. In that fight according to him, she had hit against the wall after he pushed her away to free himself. Once he had freed himself he had sought the intervention of neighbours and her family.

The State produced a medical examination report by Dr Raymond Tsakila. The post mortem report consists of the visual observations by the doctor. There was no dissection of the body to enable a thorough examination of the remains nor was the doctor called to explain why this was not done. The State, in my view ought to have done this in light of the evidence led in court which show that there were more physical injuries apparent to the naked eye than were established by the doctor. For example two witnesses testified that the deceased's left lower leg was fractured since the foot dangled in all directions. These same witnesses also describe various other superficial injuries which the doctor did not record in his report. We are not in any way suggesting that a different cause of death would have been established but that perfunctory post mortem examinations do not assist the court in arriving at a just conclusion regarding the issues on trial. Had the doctor explained the injuries seen by the witnesses the court in all probability may have been in a position to question the explanation given by the accused as to how the alleged "fight" progressed. In the absence of independent evidence the court is left to rely on the accused' word regarding the events which led to the deceased's death.

The only independent eye witness was the accused's child who was unable to recollect the events with any degree of certainty. She was too young then. Her evidence was worthless. The three adults testified to events after the assault. Their evidence did not touch on the issue relevant to the determination of the mental element of the crime charged. On a charge of murder, the State must prove that the accused committed the act resulting in the death of his victim with either the intention to produce the consequence or with a realisation of the real risk attendant to his conduct. Put differently, the State must show that when he, in the present case, engaged in a fight with the deceased, he intended to kill her, clearly, this was not proved nor was it possible, in light of the available evidence possible to prove such an intention. The State, at best may have led evidence to show that the accused realised the real risk of death or

serious injury resulting from his assaulting the deceased in the manner that he did. Unfortunately, the State had no way of establishing how the accused assaulted the deceased. Had the medical examination report been more detailed, it could have sought to rely on circumstantial evidence to persuade this court to find that he must have realised the attendant risk in subjecting the deceased to a particular injury. Again there was no evidence regarding the injuries on her person besides what the independent witnesses observed which evidence was not confirmed by the medical doctor.

At the end of the day we were left to surmise as what really happened. In light of the accused's explanation, it is difficult to discount it as so improbable that it is untrue. The concession by the State that only culpable homicide was proved, in our view, is quite proper. His explanation is reasonably possibly true. If that is the accepted version, then by his own word, the use of firewood sticks all over her body, the pushing of the deceased against the wall in the dark confines of their house constitute an act of recklessness on his part. Although he may not have intended the deceased's death a reasonable person would have taken steps to avoid its occurrence. In failing to do so, the accused was negligent. In our view, on the admitted facts the accused cannot escape a finding that he is guilty of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*].

In the result the accused is found not guilty of murder but of culpable homicide.

### **REASONS FOR SENTENCE**

The court takes into account all the factors pointed out by his counsel as being mitigatory. These include the fact that he is a first offender and has always admitted that he was guilty of culpable homicide. He has two children whom he orphaned by killing their mother. He will be haunted forever by this unfortunate event. The stigma of this conviction in a way is punishment on its own. The court takes into account however the fact that the accused paid reparations to the deceased's family in the form of eleven herd of cattle. He will in all probability lose his employment as a result of this conviction. He has lost all his household property to his in-laws as a direct result of this offence.

Against this the court does not lose sight of the fact that precious human life was unnecessarily lost. The reason for the deceased's death was jealousy. You had previously taken this issue of infidelity up to her parents. You could have done this again and avoided the

deadly fight which you had with your wife. The facts of this case show that this was a case of domestic violence. By your own admission you had previously had quarrels over issue about infidelity. You then used your physical might to settle the issue. This act cannot be condoned by passing a light sentence. A heavy sentence is clearly called for, notwithstanding the fact that you are a first offender and that you have made reparations with your in-laws. There is need to send an appropriate message on domestic violence. It will not be tolerated by the courts. The reason for the loss of life here is that the deceased's paramour called her and she refused to disclose his identity. It is for these reasons that the following sentence will meet the justice of this case.

“6 years imprisonment.”

*Gonese & Ndhlovu, Accused's legal practitioners*  
*National Prosecuting Authority, State's legal practitioners*